No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HURON HOLDING CORPORATION,
a corporation,

Appellant,

vs.

LINCOLN MINE OPERATING COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLANT.

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, *Judge*

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Filed.....

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STATEMENT

This is an appeal from a judgment entered for appellee in the United States District Court for the District of Idaho, Southern Division, on March 3, 1938.

The action was commenced in the Seventh Judicial Idaho State District Court, Gem County, against other defendants than the appellant. It was a claim and delivery action under applicable Idaho statutes.

Appellee claimed ownership of a large quantity of mining machinery, equipment and supplies on the Lincoln

group of mines, consisting of five claims, in Gem County, Idaho, belonging to the appellant as beneficial owner. The action sought return of the property or its value and damages for its detention after demand had been made. The action was originally brought against Manufacturers Trust Company, Alexander Lewis and Fred Turner. Alexander Lewis died before the trial (Tr. 183). Fred Turner was an employee without personal liability (Tr. 183) and the action was dismissed as against him. Dismissal was had as to the Manufacturers Trust Company (Tr. 184).

The action was commened in July, 1936, and removed to the Federal Court. The appellant was not made a party for over a year thereafter—and was first brought in by an amended complaint which was filed in the Federal Court on August 17, 1937 (Tr. 22). A copy of summons and complaint and amended complaint was on August 18, 1937, served upon the Auditor of Gem County, Idaho, as the appellant had not complied with the laws of the State of Idaho in the matter of filing its articles of incorporation designating statutory agent. The appellant appeared specially questioning the service by motion to quash (Tr. 40-41), which motion was overruled on September 24, 1937 (Tr. 44). The same objection was unsuccessfully raised by appellant in motion for directed verdict (Tr. 177). The question involved was whether the appellant "was doing business in Idaho" so as to subject it to substituted service upon the County Auditor of Gem County, Idaho.

Appellant employed Turner and another man and had done prospecting work on the mining claims after it acquired possession thereof in July, 1933 (Tr. 68-69). Turner detailed his work which was entirely exploratory and developmental (Tr. 109-150-155, Fozard 161).

Appellee took over a lease of the Lincoln group of lode claims which was made March 25, 1926, between Alexander Lewis, then naked title trustee for Manufacturers Trust Company, and Henry Dorman. Appellee carried on extensive work under the lease as assigned to it by Dorman until October, 1929, at which time it defaulted in performance, abandoned possession and delivered its quitclaim deed to Alexander Lewis (Tr. 65).

The appellee in the course of its operation expended over $300.000.00, but extracted only $25,000 in ore value. It added to the mill and flotation system which was on the property (Tr. 66). Accountant Fox detailed appellee's expenditures (Tr. 70-71-80-83).

When it surrendered possession and ceased operation of the Lincoln group of mines in October, 1929, appellee left the personal property it had installed and made no effort to repossess it—in fact paid no taxes—employed no watchman—paid no insurance, and practically abandoned whatever it had placed on the mine (Tr. 66-160). It was subject to a mortgage of $45,000, drawing interest at 8% annually, which more than covered the value of the property.

November 21, 1931, Mr. Lewis, acting for the bene-

ficial owner, Manufacturers Trust Company, leased and optioned the Lincoln group to Wm. I. Phillips, who was the President and the majority stock owner of the appellee corporation. He organized a new corporation under the Idaho laws—the Ojus Mining Company—and after assigning his lease and option to it (Tr. 66-67) that company operated and took out about $7,000.00 in ore value, but failing to perform under the terms of its lease and option surrendered possession of the group of claims in April, 1933. During its operation, the personal property which the appellee had left on the group of claims in 1929 was used by the Ojus Company—whether with appellee's consent not being disclosed (Tr. 67).

When the Ojus Company turned back the mine to Mr. Lewis an inventory called the Harvey Inventory was made by appellant and it included all personal property then on the group, whether owned by Lewis, Ojus, or Appellee (Tr. 58-59-111).

Its property remained on the mine without removal or any attempt to exert any possessory right concerning it; Appellant's possession resting on the fact that the property was on its mining claim, was a lawful possession (Tr. 66-110-111) until June 4, 1936, when the president of the appellee, with its attorney, went to the mine and without specification or identification, demanded from Turner the personal property which they said belonged to the appellee (Tr. 61). This demand was refused and appellee commened the claim and delivery action on June 29, 1936.

The appellee attached as Exhibit "A" to its amended complaint a list of the personal property claimed by it. (Tr. 25-36). This consisted of kitchen utensils, stoves, beds, and other minor items, and also large and important mining machinery, motors, and equipment. In addition it describes a Marcy Ball Mill which the appellee had placed upon the property. It also includes a large number of smaller items used in connection with mining operations and office equipment.

During the course of the trial the appellee introduced as its exhibit No. 12, its own specially prepared inventory of property claimed. During the course of the trial it eliminated by red ink lines a number of items. It asked permission to amend its complaint by substituting Exhibit No. 12 for Exhibit "A" which was attached to the complaint. The court refused to admit the amendment (Tr. 152-154).

Appellee's expert witnesses, Parsons and Arnold, testified as to the value of the various articles described in Exhibit No. 12 and as to the rental value thereof. There being no market at the mine the court permitted testimony to be given as to values at Boise, Idaho.

There was no evidence that the property, and particularly the Marcy Ball Mill, could actually have been sold or rented during the period covered either at Boise or at the mine.

Appellant offered testimony in connection with the question of value as reflecting rental prices that the ap-

pellee company had in 1927 given a chattel mortgage to William I. Phillips upon the Marcy Ball Mill and certain mill equipment and motors and other items therein described to secure the payment of a $45,000.00 principal note to Phillips, which with interest due totalled over $75,000 (Exhibit 17) (Tr. 200-206).

It also offered Exhibit No. 18, a transfer of that mortgage to Helen S. Pearson (Tr. 206-210). The court refused to admit either exhibit.

This evidence was important because under the statutes of Idaho, the property could not be removed from Gem County, Idaho, or sold or disposed of without the written consent of the mortgagee and it, therefore, could not have been sold or rented in Ada County, where the market prices on which the expert witnesses testified as to sale and rental values were established. It was a crime, larceny, to remove, sell or dispose of that property without the consent of the mortgagee. The appellee, having no use itself for the property and therefore wishing to sell or lease or remove it from the Lincoln group of mines and into some other county, it was perforce required to secure the consent of the mortgagee, otherwise it could not rent or sell the property, or any part thereof. It had then as a practical matter no rental or sale value to appellee during the period of detention unless its mortgagee consented.

The case was tried before a jury and all of the party defendants were dismissed excepting only the appellant, and judgment was rendered against it for the sum of $6,730.70.

The claim and delivery statutes of Idaho make special provision for a judgment fixing the value of the property in order that if it were not returned the judgment against the appellant should be for the value of that property in addition to any damages sustained by reason of its unlawful detention.

The verdict was merely for damages. The judgment followed the verdict and did not fix the value of the property and provide for a money judgment if it were not returned as the statute provided. (Tr. 56-57).

Appellant, by its answer (Tr. 45-48) set forth the defense that it was not within the jurisdiction of the court because not served personally, and that the service which was had on the Auditor of Gem County, Idaho, was not legal service, also abandonment of both title and possession, and finally pleaded the bar of the statute of limitation. In the trial, however, it was stipulated and agreed that the appellant abandoned all claim to the property but had detained it from June 4, 1936, until October, 1937, at which time it had withdrawn its denial of the rights of the appellee, and its own claims to the property as made in the pleadings (Tr. 60).

POINTS AND AUTHORITIES

I.

APPELLANT WAS NOT DOING BUSINESS IN IDAHO AND THEREFORE SUBSTITUTED SERVICE MADE UPON IT WAS ILLEGAL.

This point covers Assignments of Error No. 1 and No. 2.

"ASSIGNMENT OF ERROR NO. 1

"The court erred in denying the motion of the defendant to quash service of summons and dismiss the action on the ground that the said defendant had not been served with summons or complaint in any lawful manner." (tr. 198-199)

"ASSIGNMENT OF ERROR NO. 2

"The court erred in denying the said defendant's motion for a directed verdict in its favor on the ground that it had not been properly served with summons and complaint in accordance with the laws of the State of Idaho and was not within the jurisdiction of this Court and was not doing business in the State of Idaho at the time of the attempted service upon it." (Tr. 199)

Boise Flying Service, Inc. vs. General Motors Acceptance Corporation, 55 Idaho 5, 36 Pac. (2d) 813.

Burlington Savings Bank v. Grayson, 43 Idaho 654, 254 Pac. 215.

Portland Cattle Loan Company vs. Hansen Livestock & Feeding Company, 43 Idaho 343, 251 Pac. 1051.

II.

BECAUSE THE VALUE OF APPELLEE'S PROPERTY WAS A VITAL ISSUE THE COURT ERRED IMPORTANTLY IN REFUSING EVIDENCE TO SHOW CAUSE THAT IT COULD NOT BE REMOVED FROM GEM COUNTY, NOR SOLD OR DISPOSED OF WITHOUT CONSENT OF THE MORTGAGEE.

This point covers Assignments of Error No. 3, a part

of No. 4, subparagraph (a), a part of No. 5, being Defendants' Requested Instructions Nos. 14B and 14C, and Assignment of Error No. 6.

ASSIGNMENT OF ERROR NO. 3 is not copied here for the reason that it contains copies of Exhibits No. 17 and No. 18, and is too long for exact quotation. This assignment epitomizes the offer to introduce exhibits No. 17 and 18, being the chattel mortgage from appellee to Wm. I. Phillips and the assignment by him to Helen S. Pearson (Tr. 199-210).

"ASSIGNMENT OF ERROR NO. 4:

> "That the evidence is insufficient to support the judgment in the following particulars:
> "(a) That there is no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention." (Tr. 210).

"ASSIGNMENT OF ERROR NO. 5, (in part):
"DEFENDANTS' REQUESTED INSTRUCTION NO. 14B;

> "You are instructed that there is no evidence in this case on the value of the use of the mill and the mill equipment and, therefore, you cannot find in this case any amount for the detention of the mill and the mill equipment." (Tr. 214).

"DEFENDANT'S REQUESTED INSTRUCTION NO. 14C:

> "You are instructed that before you can consider

the rental value of any of the items of property you must find that the property could have been rented and that there was a market for the rental of said property." (Tr. 214-215).

"ASSIGNMENT OF ERROR NO. 6

"That the court erred in instructing the jury as follows:

"That reasonable value of the use of such property is to be estimated by the ordinary market price of the use of such property in the vicinity where said property is so situate.

And in also instructing the jury as follows:

"If you find from a preponderance of the evidence that the personal property unlawfully detained by the owner or owners of the Lincoln group of claims has a rental value in the vicinity of Boise, Idaho, where the property is situate, you should return a verdict for the plaintiff for such reasonable market rental thereof."

Which instructions were timely objected to on the grounds that they were inconsistent and not based on any evidence showing that the property could be rented or used during the period of detention." (Tr. 216-217)

Section 44-1007, Idaho Code Annotated.

Young v. Boise Payette Lumber Co., 45 Idaho 671, 264 Pac. 873.

Section 17-3907, Idaho Code Annotated.

State v. Olsen, 53 Idaho 546, 26 Pac. (2d) 127, at p. 128.

III.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE MILLING AND MINING MACHINERY COULD HAVE BEEN RENTED OR USED DURING THE PERIOD OF UNLAWFUL DETENTION.

This point covers Assignment of Error No. 4, and part of Assignment of Error No. 5, to-wit: Defendants' Requested Instructions Nos. 14B and 14C. (Tr. 210-214).

"ASSIGNMENT OF ERROR NO. 4:

> "That the evidence is insufficient to support the judgment in the following particulars:
>
> (a) That there is no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention.
>
> (b) That there is no substantial evidence that the milling and mining machinery could have been used or had a usable value during the period of detention." (Tr. 210)

ASSIGNMENT OF ERROR NO. 5, (in part):

Appearing in full under Point II.

8 R. C. L., pp. 487-489, sec. 48.
23 R. C. L., p. 912, sec. 75.
Osier vs. Consumers Water Co., 41 Idaho 268; 239 Pac. 735.
McMaster v. Warner 44 Idaho 544; 258 Pac. 547,
Vaughn v. Robertson & Thomas 54 Idaho 138; 29 P. (2d) 756.
Hargis v. Paulson, 30 Ida. 571; 166 Pac. 264,
Holt v. Spokane Ry. Co., 4 Ida. 443; 40 Pac. 56.
Antler v. Cox, 27 Ida. 517; 149 Pac. 731,

IV.

THE COURT DID NOT INSTRUCT THE JURY IN SEVERAL PARTICULARS AS REQUESTED BY THE APPELLANT, AND AS THE NATURE OF THE CASE DEMANDED.

This point covers Assignment of Error No. 5.

"ASSIGNMENT OF ERROR NO. 5. We do not set forth the requested instructions in full because of their length, but those we think of importance enough to warrant this court's attention are:

Defendants' Requested Instruction No. 14B (Tr. 214) (See point II.)

Defendants' Requested Instruction No. 14C (Tr. 214) (See point II.)

Defendants' Requested Instruction No. 10 (Tr. 212-213)

23 R. C. L., Sec. 75, p. 912.

54 C. J., para. 359, p. 612.

54 C. J., para. 364, p. 614.

DEFENDANTS' REQUESTED INSTRUCTION NO. 11:

"You are instructed that in this case the plaintiff has failed to prove that it would have used the property had it not been detained by the defendant, and having failed so to prove the same, you are instructed that the only amount that you can allow for the detention is interest at the rate of six per cent per annum during said period of detention, said interest to be computed upon the value which you determine said property had." (Tr. 213)

DEFENDANTS' REQUESTED INSTRUCTION NO. E;

"You are instructed that the defendants were never under any obligation to actually take any of the property of the plaintiff off of the Lincoln Mines Group and deliver it to the plaintiff. They were under legal obligation only to permit the plaintiff to reasonably enter upon said Lincoln Group of Mines and remove plaintiff's property therefrom. The defendants' refusal to so permit the plaintiff to do began June 4, 1936, and ended October 15, 1937, and the plaintiff since the last mentioned date has had the right of possession and removal of said property, and the defendants' unlawful detention thereof ceased and under the law the possession of the property was returned to the plaintiff by the defendants on said October 15, 1937." (Tr. 215)

Blackfoot City Bank vs. Clements 39 Idaho 194, 226 Pac. 1079.

54 C. J., para. 376, p. 623.

23 R. C. L. sec. 73, p. 911.

Vance vs. W. A. Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111.

V.

THE VERDICT AND JUDGMENT WAS NOT IN ACCORDANCE WITH THE REQUIREMENTS OF THE IDAHO CLAIM AND DELIVERY STATUTES.

This covers Assignment No. 7:

"ASSIGNMENT OF ERROR NO. 7:

"That the judgment and verdict was contrary to law in

that the judgment fails to comply with the applicable provisions of the statutes of the State of Idaho, specifically Section 7-222, Idaho Code Annotated, which is as follows:

> "Verdict in claim and delivery. —In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and if so instructed, the value of specific portions thereof, and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property."

in that the said judgment and the verdict of the jury on which it was based did not find the value of the property detained by the defendant." (Tr. 216-217).

Section 7-222, Idaho Code Annotated.

CONCLUSION

ARGUMENT

I.

APPELLANT WAS NOT DOING BUSINESS IN IDAHO AND THEREFORE SUBSTITUTED SERVICE MADE UPON IT WAS ILLEGAL.

This point covers Assignments of Error No. 1 and No. 2.

Appellant did not make filings required by Idaho statutes of a foreign corporation doing business therein. It contended it was not "doing business" in the State of Idaho.

Service was had upon the County Auditor of Gem County on the theory that the appellant was doing business and had no statutory agent upon whom service could be made and, therefore, under the law, the Auditor being made the agent for service for such a corporation the appellant was lawfully served.

In Idaho there is no precise test of the nature or extent of business that must be done in order to constitute "doing business" —the answer depends upon the circumstances of each case.

> Boise Flying Service. Inc. vs. General Motors Acceptance Corporation, 55 Idaho 5, 36 Pac. (2d) 813.

The Lincoln group of mines was originally acquired in the nature of security by the Manufacturers Trust Company. (Tr. 60-67) and title was taken in the name of an employee, Alexander Lewis. In 1933 the beneficial interest of Manufacturers Trust Company was transferred to the appellant. For a short time it employed about twenty-five men in exploration work and has continued with the service of two men during the entire period since. It has not done any mining in the sense of extracting ores, but it has driven tunnels and carried on exploration work and has also protected its property through the service of

a watchman. The appellant owns no other property in the State of Idaho.

In order that mining property be of any value some discoveries must be made, development and prospecting is necessary. This work is incidental to the ownership of the property and as an isolated transaction we contend it does not constitute the doing of business.

We realize that the appellant has expended money and has done work, but in view of the character of the property and the fact that the appellant is not a mining corporation but merely a holding or salvaging corporation, we have made the point that it does not come within prohibitions of the statutes and is not doing business.

Burlington Savings Bank v. Grayson, 43 Idaho 654, 254 Pac. 215. In this Idaho case a bank which carried on a number of loan transactions in Idaho and in connection therewith examined land covered by the mortgage was permitted to sue in the State of Idaho though it had not complied with the foreign corporation laws.

Portland Cattle Loan Company vs. Hansen Livestock & Feeding Company, 43 Idaho 343, 251 Pac. 1051. In this case the corporation carried on many loan transactions which were part of its regular business, and yet it was held not to be doing business in the state.

The transfer to the appellant of the Lincoln group of mines from Manufacturers Trust Company was consummated in New York and not in the State of Idaho.

II.

BECAUSE THE VALUE OF APPELLEE'S PROPERTY WAS A VITAL ISSUE THE COURT ERRED IMPORTANTLY IN REFUSING EVIDENCE TO SHOW CAUSE THAT IT COULD NOT BE REMOVED FROM GEM COUNTY, NOR SOLD OR DISPOSED OF WITHOUT CONSENT OF THE MORTGAGEE.

The Appellee's main concern in the trial was the establishment of damages for unlawful detention of its property. It relied upon two expert witnesses, Mr. Parsons and Mr. Arnold, to prove that the property did have a rental value based on percentages of its market value (Tr. 113, et seq., 146, et seq.)

All of the property concerned was located on the Lincoln Mine, which in turn is located in Gem County, Idaho.

The period of detention was clearly established as beginning June 4, 1936, and ending October 15, 1937 (Tr. 58-60-68-70-117-118-136-177-179-215). Whether during that time this property could have been rented and at what rental prices were therefore the vital elements to be proven by the appellee.

As a condition precedent to the rental of the property common sense requires that the appellee must definitely show that during the period involved it had undoubted right to remove it from the mine and permit it to be sold or rented. If it could not be so removed it could neither

be sold or rented and therefore the appellee could not be deprived of any rental income from it.

Appellant attempted to introduce Exhibits No. 17 and 18 (Tr. 112) —a mortgage and assignment thereof. The court sustained appellee's objection on the ground "* * * the issue here seems to be the possession." (Tr. 112).

In this the court was in error for the question of possession was not at all an issue since at the opening of the case, it definitely appeared that any rights it had to the property were withdrawn on October 15, 1937. The court, pertinently however, suggested that the exhibits might be admissible on the question of value because of the question as to the right of the appellee to remove the property. The appellant accepted the ruling at that stage of the procedure since there had been no evidence introduced to then on the rental or use value, and the exhibits were definitely tied to that phase of the case.

Later the exhibits were offered and a general objection made by the appellee sustained and exception allowed.

Exhibit No. 17 exactly copied in this record is a mortgage dated September 1, 1927, given by the appellee to William I. Phillips. Exhibit No. 18, likewise exactly in the record, is an assignment of that mortgage by Phillips to Helen S. Pearson (Tr. 166-176).

An examination of these exhibits show that Exhibit No. 17 is a certified copy of chattel mortgage in due and legal form properly filed in Gem County and generally covering all the appellee's personal property on the Lin-

coln group, specifically designating many important items such as the Marcy Ball Mill which the appellee had installed—this was described in the exhibit to the amended complaint (Tr. 29) and in exhibit No. 12 (Tr. 94), and often referred to in the testimony (Tr. 120-121-134-144-145-155-156-161-164). Its value was placed at $3,800.00 (Tr. 121).

The Fahrenwald Classifier described in the mortgage was also contained in Exhibit 'A' attached to the amended complaint (Tr. 29), and under mill machinery in Exhibit No. 12 (Tr. 94).

The filter likewise was referred to in said Exhibit 'A' (Tr. 29) and in Exhibit No. 12 (Tr. 94); its value was fixed at $1,800.00 by Mr. Parsons (Tr. 121).

The motors mortgaged are also found in the complaint's Exhibit 'A' (Tr. 29) and Exhibit No. 12 (Tr. 99-100), and the motor values were by witness Parsons valued at various prices (Tr. 122-123) aggregating several thousand dollars.

The other property embraced in the general description "* * * any and all other personal property* * *" (Tr. 168) is contained in both the complaint exhibit and exhibit No. 12 by general reference, although not specifically described.

It thus appears that a large percentage of the value claimed by the appellee for its property consisted of the mortgaged property. It was such an important part of appellee's property that the testimony would not support any

considerable verdict, even though a segregation were possible and had been made, if the mortgaged property were excluded from consideration.

At this point we suggest that the appellee's president admitted that after his company had abandoned the Lincoln group in 1929 it did not remove any machinery; also that the plaintiff had no other property in Idaho and of course could not make any use of the machinery in its own operations, he failed to state that there was either plan, intent or possibility of appellee's selling or renting any of the property. (Tr. 159-160).

Exhibit No. 18 shows a valid transfer of the mortgage from Phillips to Helen S. Pearson.

When mortgaged personal property is removed from any county where the mortgage is filed for record the validity and effect of the mortgage as against all persons is not affected thereby unless such property be removed by the written consent of the mortgagee, and it would pass to a buyer or lessee subject to the mortgage lien. Section 44-1007, Idaho Code Annotated.

This has been interpreted as requiring nothing less than written consent from the mortgagee to permit removal of property.

> Young vs. Boise Payette Lumber Company, 45 Idaho 671, 264 Pac. 873.

There is another statute of even greater importance—Section 17-3907, Idaho Code Annotated, which provides:

> "Every mortgagor of property mortgaged in pursuance of the provisions of chapter..... of title....., Idaho Code, who, while such mortgage remains unsatisfied in whole or in part, willfully removes from the county or counties where such mortgage is recorded, or destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without the consent of the holder of the mortgage, is guilty of larcency."
> Section 17-3907, I. C. A.

In the case of State v. Olsen, 53 Idaho 546, 26 Pac. (2d) 127, the crime created by this statute was discussed and the court said:

> "We deem it proper, because of the unusual and extraordinary situation shown by the record in the instant case, to say that, in our judgment, the essential elements of the crime defined by section 17-3907, I. C. A., are: The willful removal of mortgaged personal property from the county or counties, where the mortgage is recorded, while the mortgage remains unsatisfied in whole or in part, coupled with the willful destruction, concealment, sale or disposal of the mortgaged property, or any part thereof, without the consent of the holder of the chattel mortgage."

Had these exhibits been introduced in evidence the jury perforce could have found no verdict for rental use or value since not a single item of the property could be removed, sold, or rented without the written consent of the mortgagee, Helen S. Pearson. Had such consent existed undoubtedly it would have been known to the appellee's president, Mr. Phillips, who was present during the trial. The relevancy of the exhibits was clearly indicated and no objection would have been made by the appellee

had consent ever been given as required by the statute, since if that consent were given, of course the point made that the Idaho statute prevented removal, or sale, or rental of the property would have been definitely answered.

Undoubtedly it had no such consent from mortgagee Pearson—in this connection it is worthy of comment that the appellee never made the slightest attempt to remove or sell the property during the eight years elapsing from the creation of the mortgage until the very date of trial. At no time did the appellee show any concern over the property excepting on June 4, 1936, when it demanded possession. It did not pay taxes, employ a watchman, or do any of those things that would have been done had the appellee believed the property to be of value to it above the lien of the mortgage.

It did not show that it ever had a customer to either buy or rent and there is an absolute lack of any definite or specific loss of income from rental.

Assignment of error No. 3 (Tr. 199-210) specifically covers the refusal of the court to admit these exhibits.

Assignment of Error No. 4, subparagraph (a) (Tr. 210) is the appellant's point that there was no substantial evidence that the mill or mining machinery could have been rented or used during the period of unlawful detention.

Assignment of Error No. 5 covers this point in the court's refusal to give defendants' requested instructions No. 14B and 14C (Tr. 214). Instruction 14B in effect

was that there was no evidence on the value of the important use of the mill and equipment items. This error will be argued on other phases in a different portion of this brief, but at this point we suggest that there was no evidence on the value of the use of the mill and the mill equipment in either Gem County, or, as we understand it, in any other county.

Defendants' requested instruction No. 14C very definitely required the jury to find "* * * the property could have been rented and that there was a market for the rental of said property." Under our view the property could not have been rented.

Assignment of Error No. 6 (Tr. 215-216) is our charge of error in the court instructing the jury as to the values in the vinicity of Boise, Idaho. There was no evidence that this property could have been removed to the market covered by that description. Indeed it could not be removed from Gem County. This instruction erroneously implied there was no obstacle to the appellee's removal of the property or its sale or rental outside of Gem County.

The refusal of the lower court to admit Exhibits 17 and 18 allowed the jury to believe that the appellee could have sold or rented the property in the Boise market. The record shows no actual demand existing during the detention period for sale or rental even in the Boise market—certainly none in Gem County.

Had these Exhibits been admitted they would have

shown an unsurmountable obstacle to removal, rental or sale and no verdict could have been rendered beyond possibly six per cent interest as general damages.

III.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT THE MILLING AND MINING MACHINERY COULD HAVE BEEN RENTED OR USED DURING THE PERIOD OF UNLAWFUL DETENTION.

The point here is that the evidence does not show that there was a market for the rental of the property as a whole and particularly for the important item of mill and mill machinery. We have argued in the previous point that the property could not be removed from Gem County under the mortgage to Phillips which he assigned to Helen S. Pearson and, also could not have been sold or disposed of even in Gem County. Therefore, any evidence of what that property would have brought in any other county was not relevant or material until the appellee showed that it had the mortgagee's consent as required by Idaho laws to remove it.

We now suggest that the testimony itself be examined to determine its sufficiency under any circumstances.

No testimony was offered by Mr. Phillips as President of the Appellee about possibilities of renting or selling the property and we emphasize that had there been any he would have known it and pointed out how the appellee

was actually deprived of rental income or sale. Neither did he in any way account for the failure to remove the property, sell it, or rent it from the time, to-wit: October 15, 1937, when the resistance of the appellant to possession was removed, until the time of the trial, February 1938.

May we not fairly conclude that the appellee had no damage done to it from actual loss of sale or rental?

That all of the property was on the mining claims at the time of the trial is evidenced by the fact that the appellee's expert on values, Mr. Parsons, examined the property, though only in a hasty way, a few days before the trial (Tr. 116).

As a basis for controverting substantial damage as reflected in the verdict we find the utter indifference so suggestive of abandonment that appellant made that a ground of defense in its answer—the Appellee and its President, Mr. Phillips, never explained why during the years elapsing from October, 1929, to June, 1936, no attempt was made to either sell or remove the property, and why if it had a rental value no attempt was made to rent it. Surely, the appellee was under some type of logical duty to explain how that rental value existed in the few months of detention yet never existed in over six years prior to the demand nor from Oct. 15, 1936 to the time of trial. It is hardly logical or sensible to assume that the appellee would forego the great income which its expert established was to be had as a rental value.

Mr. Parsons, who alone testified on the subject, said

that the total value of the property was $16,949.16 (Tr. 138), and that there was no difference between the value as of the date of the demand, June 4th, 1936, and the time that the appellant withdrew objection to the repossession of the property October 1937 (Tr. 135).

During that period of one year and four months Mr. Parsons stated that the fair rental value was the sum of $18,460.96 (Tr. 138)—*more than the property itself was worth at any time during the detention.* Surely, if that comparatively enormous rental was lost during that period of time what a great loss was incurred by the appellee during the seven years preceding, and the several months in 1936 and 1937 when appellant withdrew its opposition to removal.

Basicly,therefore, the appellee is making a claim without what would seem to be a necessary explanation of its failure to realize something proportionate to this figure during the time suggested. This situation, it seems to us, logically throws a doubt upon the substantial accuracy of any rental or use claimed during detention.

We examine the testimony of Mr. Parsons and find that he spent between 2½ and 3 hours a few days before the trial examining the property (Tr. 116) and that is the sum and substance of his actual knowledge of it. The ridiculousness of claiming that this type of examination was sufficient or was anything more than an off-hand guess appears too from the witness' statement that were he going to himself purchase the property he would give more time to its examination (Tr. 145).

He was asked many times the rental market value. He relied upon machinery reports of manufacturers for most of his important machinery pricing (Tr. 127).

The mill value was based upon the owner's price on an Oregon mill, over four hundred miles away, and a mill at Atlanta which his own company had bought (Tr. 128). One gets the idea from his testimony that he is fixing values at what he thought he could get as a seller of the property if he had it in his Boise yard, not on market value. (Tr. 129). He did say that he would sell the property at the Lincoln mine to a mythical buyer who, of course, would remove it from its base and to a place of use (Tr. 131, 132, 133).

The importance of valuation lies in the fact that it forms the basis of rental estimates made by him which were percentages of the values. In this he admitted that where property was rented for a long period it was usually coupled with an option to purchase and the rentals would go upon the purchase price (Tr. 140-141). He was somewhat evasive later in his examination on this subject, but finally came to the admission that his rental value was not a set market value, but depended upon individual agreement (Tr. 144). He likewise admitted there was no general custom or rule about rentals and the parties usually made an independent agreement (Tr. 143-144).

If this property were rented only for two or three months his testimony might be relevant, but where a period of one year and four months is concerned, certain-

ly not, for if anyone would rent the property for that period of time, he would own it under the custom of allowing rental to go on the purchase price. If the appellant were to be charged a rental of $18,460.96, then under the practices stated by Parsons it would own it, for the entire value was only $16,949.16. Mr. Parsons claimed that such an amount was a "fair rental value" notwithstanding it would eat up the entire value of the property (Tr. 138).

A perusal of his whole testimony must lead an impartial observer to conclude that for the situation here, to-wit: a long rental—the percentages he applied were not fair or customary *and there is no evidence of what a fair rental value would be for the entire detention period.* (Tr. 139-140).

The minor valuation expert, Mr. Arnold, based his rental value upon what his individual company charges and he could not name a single article rented by that company during the period here involved (Tr. 147-148).

Now there is no other testimony on this question of rental value introduced by the appellee; they presented but the two witnesses, and we believe they did not give the jury a fair basis or a definite one on which to base a use value verdict in the amount found of $6,730.70.

When one analyzes the testimony it is absolutely impossible to tell how that amount was found. It must have been by guess and conjecture for if the jury had followed the testimony of Mr. Parsons, to a small degree substan-

tiated by Mr. Arnold, it would have found a much larger value. He left no alternative of a definite character, and the jury must have disbelieved the only testimony on the question of value and substituted its surmise without fair basis in the testimony.

It is true that Mr. Hopper, witness for the appellant, testified as to the value of motors but this took in only a small amount of the property. (Tr. 157).

No one can object that a jury compromise between conflicting testimony, but here there was no conflict in the major items outside of motors, and therefore there could have been no compromise based on testimony. It logically follows that the jury rejected Parsons' testimony and if it did that where could it have found any evidence on which to base the amount that it found? It must have assumed that the property would have been rented on special agreement since it overran the three or four months which Parsons testified was the basis for his percentages, and assumed a bargain between a seller and a buyer, and further assumed what that bargain would cover as fair rental bases. There is no evidence that special agreements were made or could have been made or what terms were customary.

The failure of the testimony becomes more noticeable when one considers the value placed by Parsons on the Mill of $3,800.00 (Tr. 121); he admitted he did not know its condition (Tr. 144-146), further that he did not know of any mill that size that had been rented—he admitted

further that he had had no rental experience with mills in Boise or vicinity, and that he based his rental value estimate on what the mill would likely rent for "on a future estimate, a possibility" (Tr. 133-135). Arnold knew of none (Tr. 148).

We do not forget the Idaho rule which protects a judgment where the evidence conflicts, but as we see this case the vital need of the appellee in order to meet its burden of proof was to establish that the property could have been rented or sold and this it did not do beyond the possibility of surmise and conjecture to that effect which may arise from appellee's expert witnesses. Surely that is offset by the failure to prove that the property could have been rented or sold by positive clear testimony to that effect and particularly by the failure of the appellee through its President, Mr. Phillips, or any other officer to so prove.

> " * * * for the rule has been repeatedly announced in this state that every party to a law action has a right to insist upon a verdict or finding based upon the law and the evidence in the case and not, in the absence of evidence, upon mere inference or conjecture."
>
> McMaster v. Warner, 44 Idaho 544; 258 Pac. 547.
>
> Affirmed in Vaughn vs. Robertson & Thomas, 54 Idaho. 138, 29 Pac. (2d) 756.
>
> Hargis v. Paulson, 30 Idaho 571, 166 Pac. 264.
>
> Antler v. Cox, 27 Idaho 517, 149 Pac. 731.
>
> Holt v. Spokane etc. Ry Co., 4 Idaho 443, 40 Pac. 56.

Osier v. Consumers Water Co., 41 Idaho 268, 239 Pac. 735.

The appellant did not use the mill or any substantial portion of appellee's property. (Tr. 150-151-155). Therefore the appellant did not actually injure the property or get any benefit from it, and in fact benefited the appellee by keeping the property and watching it. Its value was the same in October 1937 as in June 1936. (Tr.138).

There is nothing in the testimony to definitely show that any substantial part of this property, excepting possibly the motors, could have been rented. It is true that the witnesses Parsons and Arnold testified to market rental value, but that is not sufficient for their testimony was of a theoretical nature and based on what the property should have rented for if there had been a demand for it. They did not establish a demand. It seems to us extremely important to the appellant's case that it show that not only was there a market price for property rental but also it could have been rented, that there was an actual demand for it. The mere fact that if it were rented it should bring a certain rental value does not complete the picture, for in order to get any money out of the use of the property there must be someone willing to rent it.

As we have before suggested the evidence actually shows no rental demand for the mill, but further than this the question of whether the property could have been rented is left unanswered. It is not shown that appellant prevented the rental—rather is it indicated that there was no lessee in sight.

"Ordinarily the measure of damages for the loss or destruction of property is its market value, if it has a market value, and in such case no recovery can be had on the basis of its value to the owner individually, apart from its value. *In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity;* that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing, and no ability to sell the same, then it cannot be said to have a market value. If the market value would not be a fair compensation to the plaintiff for his loss, he is sometimes permitted to recover the value to him based on his actual money loss. The fact that property has no market value does not restrict the recovery to nominal damages only, but its value or the plaintiff's damages must be ascertained in some other rational way, and from such elements as are attainable. In such case, the proper measure of damages is generally its actual value, or, as is sometimes said, its value to the owner, taking into account its cost and such other considerations as may affect its value in the particular case. Though the cost may be considered, this alone is not always the correct criterion for determining the present value * * * ". (Italics ours).

8 R. C. L. pp. 487-489, sec. 48.

23, R. C. L., sec. 75, in part, is as follows:

"To permit a recovery of the usable value during the time of detention it must appear not only that the successful party had a legal right to use the property but that he was in a position to use it and was prevented from such use only by the wrongful detention thereof."

IV.

THE COURT DID NOT INSTRUCT THE JURY IN SEVERAL PARTICULARS AS REQUESTED BY THE APPELLANT, AND AS THE NATURE OF THE CASE DEMANDED.

This point covers Assignment of Error No. 5 (Tr. 210-215). Part of this assignment is Defendants' Requested Instruction No. 10, which in effect requires establishment of ability of the appellee to use the property and provides damages on an interest basis if the appellee could not have used it (Tr. 212).

If the lower court took the view that this instruction precluded the appellee from damages unless it *personally used* the property and that value is claimed, then we think we are not entitled to the instruction, but we think the word "used" indicated a use not in the sense that the appellee must personally run the mill, use the transformers, etc., but in the larger sense it includes an opportunity to rent the property. We think the jury should have had before it the possibility of the appellee renting the property and using it in the sense of securing income by rental, and if this could not be done damages should be confined to interest.

We have probably reiterated this point too often in our brief, but after all, it is the main point in our attack—the appellee was not damaged actually by the detention of the property because it could not have actually used it or rented it. A good general expression of that rule is found in 23 R. C. L., Section 75, p. 912:

> "* * * To permit a recovery of the usable value during the time of detention it must appear not only that the successful party had a legal right to use the property, but that he was in a position to use it and was prevented from such use only by the wrongful detention thereof. * * *"

We also take the view that the purpose of a judgment in claim and delivery is not punitive but compensatory, and in this again the general rule is stated in 54 C. J., para. 359, p. 612:

> "* * * Damages to the successful party in a replevin suit are ordinarily to compensate him for the loss he has sustained by being wrongfully deprived of the possession of his property * * *".

Defendants' Requested Instruction No. 11. (Tr. 213). Here again the accuracy of the court's ruling depends upon whether the word *use* should be restricted to the appellee's personal *use,* or include use for rental as has just above been suggested.

Defendants' Requested Instruction No. 14B. (Tr. 214)

We think the court clearly erred in failing to give this instruction because there was no evidence of value of the use of the mill or mill equipment. We have previously referred to the testimony of Parsons and Arnold, and they are the only ones who testified on this subject, and it is shown by the evidence that they did not know what the rental value of the mill was. If that was true we are entitled to an instruction which would take from the jury the consideration of its rental value.

Defendants' Requested Instruction No. 14C. (Tr. 214)

We have argued that unless the property could have been rented and there was a market for its rental then the appellee should not recover something that is merely a figment of imagination. Suppose that the appellee had not been refused possession of the property? Is there any evidence here to show that it could have been rented? —surely one can't assume that from the mere fact of detention arises an obligation to pay rental where there was neither market or demand.

There is respectable authority to the effect that where the plaintiff in a replevin suit does not prove any actual damages he is entitled nevertheless to nominal damages because "his rights have been infringed." 54 C. J. Section 364, p. 614.

However, we have never contended for this far rule and have felt that technical possession which appellant held against the appellee entitled it to damages at the statutory rate in Idaho—six per cent per annum.

The only estimate of the total value of the appellee's property included that portion appraised by Mr. Parsons at about $20,000.00—interest on this would amount to about $1500.00 for this period of retention. This seems to us a great deal more money than the appellee could have ever gotten out of the property in any other way during that period. Certainly it is more than it got for the seven years it let the property lie without concern on its part on the Lincoln group, and again certainly there is no eviden-

ce that from the 15th of October, 1937, when it had a perfect right to possession at least so far as any obstacle presented by the appellent affected possession, until the very date of trial, a period of four months there was no income derived from the property. It would be well repaid on the standards of its receipts, both before and after detention, if it gets interest.

We think the interest rule is recognized in Idaho in the case of Blackfoot Bank vs. Clements, 39 Idaho 194, 226 Pac. 1079, where the court said:

> "The general rule of damages in actions or replevin, where the plaintiff recovers judgment for the value at the time of the taking, is legal interest on such valuation during the time of detention."
> 54 C. J., sec. 376, p. 623:
>
> "Except where the property in controversy is shown to have a usable value and damages are estimated on that basis, the prevailing party, upon a recovery either of the possession of the property or of its value, may ordinarily be awarded the interest upon the value of the property during the wrongful detention as damages for such detention * * *".
> 23 R. C. L., sec. 73, p. 911:
>
> "In those cases where the property is recovered to the owner the damages are usually measured by interest and depreciation in value. In most cases interest on the value from the time of the wrongful taking is a proper measure. * * *"

Vance vs. W. A. Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111. In speaking of detention of property in a claim and delivery action the court said:

> "Under the decisions to which we have referred, it

is evident that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of Conrad v. Pacific Insurance Co., 31 U. S. 6 Pet. 262 (8:392). In the course of the opinion there delivered by Mr. Justice Story, the court held that the trial judge did not err in giving to the jury the following instruction:

" 'The general rule of damages is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass.' "

Defendants' Requested Instruction No. E. (Tr. 215).

In view of the answer, which denied the right of possession, it was not proper for the court to refuse to instruct the jury about the situation that arose after the answer was filed, to-wit: the withdrawal of the objection by the appellant to the repossession of the property. This was done October 15, 1937, and from then on the appellee had a perfect right, so far as the appellant was concerned, to remove the property and to use it as it pleased.

Defendants' Requested Instruction No. E would have put the situation squarely before the jury and given them

information which was necessary and at least fair and proper for them to have in view of the situation created after the answer was filed.

V.

THE VERDICT AND JUDGMENT WAS NOT IN ACCORDANCE WITH THE REQUIREMENTS OF THE IDAHO CLAIM AND DELIVERY STATUTES.

Coners Assignment No. 7. Which in effect is the variance between the judgment and the requirements of the Idaho statute. (Tr. 216-17).

The verdict of the jury is simply a finding of damages (Tr. 50-51). The judgment likewise (Tr. 56-57).

The value of the property is not fixed in either the verdict or the judgment, and fails to comply with the provisions of Idaho law, Section 7-222, Idaho Code Annotated, which is specifically set forth in Assignment of Error No. 7 (Tr. 216). This statute requires that if the verdict is in favor of the plaintiff the value of the property must be found.

The question of the right of the appellee to all of the property which it owned was removed from this case by the appellant's withdrawal of any obstacle to appellee's entry on the Lincoln group and repossession of the property, which withdrawal was made on October 15, 1937.

So far as delivery by the appellant was concerned it was not a delivery in the manual sense, but admittedly it

was the intent to withdraw whatever claim of ownership the appellant might have by reason of the abandonment of the property by the appellee from October, 1929 to June, 1936, and remove any obstacle to appellee's repossession. We find no case directly in point on that subject but we contend that delivery in the larger sense was had for it was never the duty of the appellant to take the property, much of which was substantially attached to the realty, and actually deliver it over to the appellee—it had a right to get that property when it desired but was forbidden to get it when the appellant refused in June, 1936, to permit the appellee to do the things necessary to take the property into its actual possession. Why the appellee after October 15, 1937, made no attempt whatever to take the property was never explained, and the case was tried February 28, 1938, with the appellant in actual possession in the sense that the property was on the Lincoln group of mines owned by it just as it had been since 1929.

We freely admit that there was no question whatever at the time the court instructed the jury about the appellee's right to take whatever property it owned from the mine—there was a serious question, however, about the description of that property. This arose from the fact that the appelle attached to its amended complaint filed in August, 1937, a full description of the property it claimed (exhibit 'A'). Yet, when it came to proof it did not follow that exhibit but made up a new inventory and introduced it as Exhibit No. 12 (Tr. 86-103). We did not then question and do not now question that Exhibit No.

12 clearly designated the property, but when amendment was sought to substitute Exhibit No. 12 for Exhibit 'A' attached to the amended complaint, the court very properly refused to permit the amendment. (Tr. 152-154).

As the situation then went to the jury there was no definite proof offered that the property claimed by the complaint was the property covered by Exhibit No. 12. Undoubtedly much of it was so described but the shift of base required, it seems to us, the definite finding that the property described in the complaint was really on the ground.

The appellant always throughout the trial took the attitude that any property which belonged to the appellee could be removed (Tr. 60-67-69-70).

A comparison of Exhibit No. 12 with complaint Exhibit 'A' shows many variations and leaves the question of just what property was involved quite in doubt. The appellee could not, of course, under the status of the pleadings and the denial of the right to admit obtain judgment for the delay for damages for detention of the property described in Exhibit No. 12 unless it was described in the complaint exhibit, since all it could recover even in the way of damages or value of the property was the exact property for which it sued, and that was described in the complaint exhibit but not in exhibit No. 12.

There never was any proof offered referring to the property directly at issue because all the testimony on that

point, including value and rental value, was directed to Exhibit No. 12.

While it is true that possession of whatever property the appelle owned was not in question, the appellee never took the property away from the mine, and it seems to us that the wisdom of the statute is particularly applicable here because if when the appellee did begin to take away the property a dispute arose as to just what property belonged to it and just what property did not belong to it, or if during the interim some of it had disappeared, the case would not be finally settled and relitigation must perforce be had to determine the actual value of that part of the property which could not be returned.

Definitely the settlement of the dispute between the parties as wisely required by the statute was not had by this lawsuit. Had the verdict and judgment been returned as required by law this would not be so. We believe the court could not disregard the plain mandate of the statute and provide for quite a different verdict and judgment.

No one questions that this is a claim and delivery action under the laws of Idaho. In fact, the court definitely told the jury:

> "The action is brought under the statute of the State of Idaho, and is commonly known as a claim and delivery statute, which permits the owner of the property to sue for the recovery of it, and if it is found that he is entitled to the return thereof, and return is not made after demand, the jury must find the

market value of the property, and assess damages if any are proven by reason of the taking or detention of the property." (Tr. 188).

Under these circumstances we feel that this defect, added to the several others we have presented, clearly entitle the appellant to a decision of reversal.

CONCLUSION.

The appellant did not contend during the trial and does not now contend that it was right in its early claim in June, 1936, that the appellee could not repossess its property from the mine. It did wrong at least technically, in making that denial. After the appellant came into the case when the amended complaint was filed on August 17, 1937, the objections were withdrawn in October, 1937.

The record, we think, discloses that there was no real harm done to the appellee because the property was withheld from it for a year and four months. It evidently had no concern about the property from October 1929, to June 1936, and must have regarded its possession or its use as utterly valueless since it not only failed to remove it, make use of it in any way, or sell it, but actually did not have a watchman on the ground, or pay taxes, or do anything else to indicate that it had a concern over what it now claims to be very valuable property. Whether this was due to the fact that it was mortgaged for many times its value or due to no market is still a secret with the appelee. The record fails to disclose any reason for the failure of the appellee to take the property into its possession during this seven year period, nor possibly more im-

portant does it show any reason why after the appellant withdrew its objections to repossession in October, 1937, that the appellee did not remove the property or make any attempt to repossess, or use it, or rent it.

Not the slightest bit of evidence was ever introduced by the appellee's President and controlling factor, Mr. Phillips, or by any other witnesses, to show that during the period of detention the property actually could have been rented or sold. The appellant did not use the property and it did not depreciate in value while held.

We admit that we should be subject to some type of penalty, because we denied possession, whether that brought about any actual damages or not, but to penalize the appellant so heavily without any real showing of actual damages or possibility of rental or sale of the property is going too far. The law seems to be that in such a case as this interest at the statutory rate—six per cent per annum in Idaho—is punishment enough for appellant and compensation enough for appellee. From the standpoint of finances the payment of interest to appellee would bring it more money than it got before or after the detention for the use of the property and would more than compensate for any actual damages.

Respectfully submitted,

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